IN THE

Supreme Court of the United States

SPRING TERM, 1977

76-1708

DONALD MARTIN STERN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOW COMES the Petitioner, DONALD MARTIN STERN, by his attorneys, JAMES W. BURDICK and NEIL H. FINK, and respectfully Petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the decision of said Court affirming his conviction of fraudulent and knowing failure to manifest or declare merchandise, or failure to declare all articles brought into the United States, in violation of 18 U.S.C. §545, to consider the important legal issues contained herein.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was decided and filed May 4, 1977. The Order and Memorandum Opinion of the United States District Court for the Eastern District of Michigan, Gubow, Jr., were filed on January 15, 1976. These documents are reprinted in full in the Appendix hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was filed May 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I.

WHEN A DEFENDANT ESTABLISHES A *PRIMA FACIE* CASE OF IMPERMISSIBLE SELECTIVE PROSECUTION AND THE GOVERNMENT FAILS TO PROVIDE A SATISFACTORY EXPLANATION, MUST THE INDICTMENT BE DISMISSED DUE TO THIS CONSTITUTIONAL IMPROPRIETY?

II.

IS IT ERROR TO SUBMIT A CASE TO THE JURY WHEN THE EVIDENCE AT MOST ESTABLISHES NO MORE THAN A CHOICE OF REASONABLE PROBABILITIES, ONE CRIMINAL AND THE OTHER INNOCENT?

III.

WAS THE GOVERNMENT'S ARGUMENT TO THE JURY ON DEFENDANT'S FAILURE TO PRODUCE CERTAIN PERSONS AS CHARACTER WITNESSES AN IMPERMISSIBLE COMMENT ON HIS RIGHT TO REMAIN SILENT AND AN ERRONEOUS ATTEMPT TO SHIFT THE BURDEN OF PROOF TO HIM?

IV.

IS FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY AS TO DEFENDANT'S THEORY OF THE CASE REVERSIBLE ERROR?

V.

IS IT ERROR FOR AN INDICTMENT NOT TO CONTAIN THE CITATION OF PERTINENT AND NECESSARY REGULATIONS WHICH PROSCRIBE THE CONDUCT ALLEGED THEREIN?

STATEMENT OF FACTS

The Petitioner, DONALD MARTIN STERN, was charged in a three-count Indictment with failing to manifest or declare merchandise carried into the United States or failure to declare all articles brought into the United States and two counts of attempting to introduce into the commerce of the United States imported merchandise by means of a knowingly false and fradulent

declaration to a United States Customs Inspector. After a trial by jury before the Honorable Lawrence Gubow, Mr. Stern was found guilty of the first count (Trial Transcript[1] VI 105) and sentenced to a two-year probationary period.

As a result of a pretrial defense motion, an evidentiary hearing was held on the issue of whether the within prosecution was selectively discriminatory and violated your Petitioner's right to equal protection of the law as guaranteed by the United States Constitution. The thrust of this motion was to dismiss the instant Indictment on the basis of the aforementioned constitutional impropriety.

The evidence presented at this hearing indicated Clifford Best, a Special Agent of the Bureau of Customs (Evidentiary Hearing Transcript[2] 7), placed the Defendant under arrest for the offenses alleged in the Indictment. (EHT 48). However, this was not the first confrontation of Messrs. Stern and Best.

Agent Best had, on prior occasions, investigated the Petitioner, a customs house broker, for "several months," (EHT 10) and in fact, personally spent five hundred hours on that case (EHT 13). Nevertheless, neither criminal indictment nor license revocation proceedings were ever instituted as a result of the investigation. (EHT 14).

Yet, Mr. Best was of the opinion Donald Stern was "not a very good" customs house broker (EHT 14). In addition, he felt Appellant's company was "operating in a manner completely. . . against all customs' regulations,

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[1] "Trial Transcript" will hereafter be referred to as "TT."

[2] "Evidentiary Hearing Transcript" will hereafter be referred to as "EHT."

against the custom regulations that pertain to custom house brokers. . ." (EHT 15). Furthermore, these beliefs, and your Defendant's identity, were placed on the Bureau's CADPIN machine, a computer network which reflects warrants and suspects.[3] (EHT 36, 37). Incredibly, however, entries are made only when "a violation occurs." (EHT 37).

Moreover, Special Agent Best's methodology in the prior investigation was questioned (EHT 40-42, 154-155). Complaints by Mr. Stern and his attorney resulted in the agent being admonished by his superiors (EHT 154).

On the pertinent evening, Agent Best was not on duty (EHT 20), but rather, was socially visiting a co-worker (EHT 35). Even though there were thirty other Special Agents with the Customs Department in Metropolitan Detroit (EHT 79, 155), it was determined Mr. Best should be brought in because he "understands Mr. Stern." (EHT 79).

Prior to the arrival of Clifford Best, the supervisory customs inspector, William Rearick, had decided to proceed against the Petitioner administratively (EHT 114). This decision was made after other sanctions were considered and rejected (EHT 114, 116). Accordingly, he was fined (EHT 52), a duty imposed (EHT 115) and his automobile seized (EHT 116).

In fact, Mr. Rearick never considered Donald Stern's action constituted a criminal violation because such cases are routinely handled administratively (EHT 116). The inspector, in arriving at this decision, applied the standards "as set forth by the Chief Inspector's Office." (EHT 117). The propriety of Mr. Rearick's actions were never questioned by his superiors (EHT 119-120).

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[3] Mr. Best also felt it necessary to inform an associate he had uncovered "several violations." (EHT 77)

Furthermore, the inspector, with twelve years of experience (EHT 116), did not know (EHT 116), or ever heard of (EHT 117), an instance where merchandise, not involving weapons or narcotics, was brought in without a proper declaration and was not handled administratively. In fact, the government could produce only three cases in the preceding seventeen years where a criminal prosecution was instituted (EHT 144-145, 192).[4]

Nonetheless, when Special Agent Best arrived it was decided Donald Martin Stern would be arrested (EHT 49-50).[5] In addition, Mr. Best determined it was necessary for your Petitioner to spend the night in the Wayne County Jail and transported him there in handcuffs. (EHT 50). Incredibly, this occurred even though persons accused of certain narcotics offenses are routinely released on their own personal recognizance. (EHT 164-165).

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[4] One case involved jewelry concealed on the person inside an undergarment (EHT 144) and was subsequently dismissed (EHT 144). The other two instances involved whiskey: one accused was a notorious gambler (EHT 148) and the other had a long criminal record (EHT 149). This prosecution was justified because the person had been apprehended on three prior occasions "for the same type of offense." (EHT 161).

[5] Scott Eshelman, a Special Agent of the Bureau of Customs (EHT 73) who was involved in this matter, testified that since he had been so employed, he did not know, or even heard of another case "where something like seven hundred or seven hundred fifty dollars was involved and where receipts were presented for all of the merchandise [personal goods — not weapons or narcotics] where the man has been subjected, number one, to a forfeiture of the goods and number two, to a penalty in the full amount and number three, to a seizure of the automobile and an arrest." (EHT 103-104) In fact, he admitted never seeing "anything like this." (EHT 104).

This decision was made with the knowledge Mr. Stern had never been in jail before, (EHT 50, 61) that this particular jail was notorious for fights, stolen property and sexual molestations (EHT 50, 61) and in spite of his attorney's assurances he would present him to the proper authorities the following morning (EHT 45). Moreover, Mr. Best deemed it necessary to inform Defendant-Appellant he was going to "a rough place." (EHT 50).

Furthermore, when Harvey Tennen, an attorney and former judge, attempted to intervene in relation to the decision to incarcerate Mr. Stern, he was informed the Defendant "was a special person to the Customs Department" (EHT 135) and this was being done to teach him a lesson. (EHT 135). In addition, Judge Tennen was told this was not being done because Donald Stern was Jewish. (EHT 136)[6].

Moreover, when Agent Best met with Petitioner the following morning, he felt compelled to tell "Mr. Stern, you probably feel that what is happening to you is because you are Jewish. But let me assure you that it is not." (EHT 58). Needless to say, such a statement is an unusual occurrence in the Customs Department. (EHT 97).

At the conclusion of said evidentiary hearing, the Court denied Defendant's Motion to Dismiss the Indictment. (EHT 127). In doing so, it made some crucial findings of fact.

> [The Defendant] is charged with importing certain merchandise without properly declaring it.

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[6] Agent Best admitted he spoke with Mr. Tennen. (EHT 129).

The merchandise in question is harmless, consisting of toys, antiques, china and clothing. Had he properly declared these items, the duty owing would have amounted to $68.00. The defendant does not have a prior criminal record. In all previous similar circumstances involving other such offenders, the Customs Department has proceeded administratively without result in criminal prosecution. Administrative action has also been taken against Mr. Stern to the extent of a one hundred percent penalty and the seizure of this automobile.

I might point out that it is not clear to the Court, even after hearing the testimony, exactly why in this case a criminal prosecution was also brought. One possible explanation is that Special Agent Clifford Best, who played a principal role in executing the arrest and in seeking criminal sanctions against the defendant, had developed a personal dislike for defendant stemming from an extensive investigation conducted by Best into the defendant's operation as a Customs broker. Notwithstanding Best's efforts, no action had been taken against the defendant at the time and I believe even to this time, to Best's obvious disappointment.

Best's personal feelings toward the defendant were reflected in the unnecessarily harsh treatment meeted (sic) out to the defendant at the apparent initiative of Best immediately following his arrest. For in spite of a clean prior record and notwithstanding his obviously deep roots in the community which were known to Best and the

other Agents involved, the defendant was incarcerated over night in the Wayne County Jail. Even the vigorous efforts of Mr. Rosenthal, defendant's attorney, to secure defendant's release on board were to no avail until the following morning.

Now, this is in shocking contrast to the usual treatment of arrested violators. There was testimony that even some [individuals] charged with smuggling narcotics are not incarcerated. No adequate or even candid explanation was offered by Government witnesses for the special treatment of the defendant in this regard.

To the extent that the animosity of Agent Best toward defendant might explain the Government's decision to proceed against him, this prosecution, in the opinion of the Court, from what it has heard, must certainly be regarded as a monument to misguided zeal and bad judgment.

* * *

I suggest that at the very least, the Customs Department policy which permitted and condoned the harsh post-arrest treatment of the defendant should be examined and reformed. I say this because of what I heard from the witness stand in the course of this hearing. For example, I have never heard such equivocation of testimony, especially from Agents of a Federal Agency.

What I'm referring to is this: First, the hesitation on the part of the witnesses to answer many of the questions; two, the evasive answers; and at least twice, Agent Best answered that he couldn't figure out what the attorney was getting at. In both of those cases, the Court had to admonish and warn him that it was not for him to figure out what the attorney was getting at but to answer the question. Thirdly, the testimony with regard to the file in this case. Agent Best first said it was in his office and then when the Court indicated it would call a recess to allow him to get the file so that it could be reviewed in camera, he said it was on the table. I can't conceive of an Agent bringing a file over for a hearing, putting it on counsel table and then a few minutes later saying it is in his office. Four, the testimony by Mr. Best that a felony was committed in his presence when he was called there after the defendant had been stopped by the Agents at the Tunnel. Five, Agent Best's testimony and the evidence presented relative to his remarks about an attorney. Six, Agent Best's testimony about his statement to Mr. Stern relative to the fact that, "You probably think I'm doing this because you are Jewish, but that isn't so," or remarks to that effect. In the opinion of the Court, this is like the usually used statement, "Some of my best friends are Jewish." Even Mr. Harnisch, in his closing argument, stated, and I quote, "Mr. Best made a statement which bothers me and should bother the Court, a statement which was improper and out of order." Seven, the fact that Mr. Eshelman, in the car at

the time that the statement admitted by Mr. Best was made, heard so many things but didn't hear this statement. Eight, the testimony of Mr. Liming relative to the practice of arresting a person at the Tunnel or Bridge for such a violation in light of Mr. Rearick's testimony that in twelve years with Customs, he has never seen this happen, and the answer based on what I'm sure was a thorough search of their files and yet they could come up with only three arrests in the past seventeen years. And, lastly, the fact that the Assistant U.S. Attorney, Mr. Harnisch, at the request of the Agents, I'm sure, requested that the Agents be excused because there was so much work to be done and they needed to be allowed to leave so they could attend to their duties; yet despite this request which the Court granted, one Agent remained in the courtroom and one in the hallway. (EHT 210-215).

At the trial below, the testimony indicated Donald Martin Stern was in the "auto-line" or "Primary Inspection" of the Detroit-Windsor Tunnel on November 12, 1972, at approximately 4:15 P.M. (TT I 74-75). The Defendant and his wife were returning from a four-day vacation at Toronto, Canada. (TT IV 58-59).

The inspection lanes at this time were congested (TT IV 73) and it was raining (TT IV 73). The intemperate weather increased the extreme pain concomitant with an eye-injury Mr. Stern received while in the military and for which he was under medication. (TT IV 60, 7-71, 73). While waiting in line, your Petitioner was listening to a football game on his car radio. (TT IV 59, 73, 89).

When the Stearns reached the customs inspector, inquiries were made as to their citizenship and point of departure. (TT I 76; IV 61, 73). The Defendant noticed the inspector staring at his Swiss-made watch, which had an unusual movement. (TT IV 73, 85, 86, 88).

Donald Stern thought he was next asked if he had anything else "from Canada to declare" (TT IV 73; V 4) and responded "nothing." (TT 176; IV 61, 74). His interjected "Nothing?" (TT IV 74). Realizing that he "either misunderstood [the] question or something,"[7] (TT IV 74; V 4), he started to make a declaration (TT I 78; IV 61, 74; V 7), but was interrupted by a request to exit the vehicle. (TT IV 74).

Mr. Stern apologized and stated "I do have things to declare from Canada. I have toys, clothing and miscellaneous antique items." (TT IV 74; V 7). He then honored instructions to open his trunk. (TT I 78-79; IV 61, 74-75). Inside, the inspector clearly saw "clothing, bags, paper sacks, merchandise." (TT I 79, 101, 105, 106; II 22).

Petitioner was subsequently sent to "Secondary Inspection." (TT I 80; IV 64, 75). There he was asked "What do you have to declare?" (TT II 8; 65, 76) and Mr. Stern responded that he had toys and clothing.[8] (TT IV 65, 76). Again his wife interjected, "Donald, and

[7] Although the inspector believed the question was "What are you bringing back from Canada?", he stated the question might have been "whether he had anything to declare other than from Canada?" (TT I 83)

[8] The inspector stated the response was "toys and other things." (TT II 17)

antiques" (TT IV 65, 76) and he immediately stated "And antiques." (TT IV 65, 76).

Donals Stern was then questioned as to the value of this merchandise (TT II 8; IV 76) and he responded with an "approximate figure"[9] (TT IV 76) of "about $500.00." (TT II 8, 17, 20). There were several bills and your Defendant had not been given an opportunity to precisely calculate them. (TT IV 66).

After presenting all his receipts to the customs inspector (TT II 9; IV 42, 78), Mr. Stern was informed the total was $924.00. (TT IV 42, 78). He responded that this figure was "Impossible" (TT IV 42, 78) and a recalculation established an error had been committed and the amount was $136.00 less. (TT IV 42, 78).

Asked about the validity of this second figure (TT IV 43, 78), Petitioner indicated "You have the adding machine in front of you. If you say they add up to 700 and some odd dollars, I'm not going to dispute you. I gave you an approximate evaluation and I presented all the bills to you for that purpose." (TT IV 78). An amended declaration was accepted (TT IV 46-47, 55, 81) and a duty of $68.00 was calculated.[10] (TT IV 68).

The evidence presented at trial also established your Petitioner was a married man (TT IV 58) with three young daughters (TT IV 57-58), as well as an Air Force veteran of the Korean War. (TT IV 70-71). He holds a

[9] The inspector believed this declaration was an estimation. (TT II 20).

[10] Some of the items were, in fact, duty-free. (TT IV 50).

customs house broker's license (TT IV 72) and has authority to deal with various governmental agencies (TT IV 72). In addition, Mr. Stern has no prior criminal record. (TT IV 72).

Moreover, Donald Stern frequently traveled to Canada (TT IV 69) and knew there was a reasonable possibility his car would be searched (TT IV 69). In fact, he had been "examined" on several prior occasions. (TT IV 94).

Furthermore, Mr. Stern was of the belief the Bureau of Customs was conducting "more and more" searches as a result of increased narcotics trafficking (TT IV 95-96). Also, due to the season and Great Lakes' shipping schedule, his chances of being examined were greater (TT IV 96). Significantly, your Petitioner felt that if he acted contrary to the customs laws, he would lose his license and livelihood. (TT IV 82; V 23, 25).

At the conclusion of the government's case-in-chief, the Defense made a motion for a directed verdict. (TT II 51-53). It was granted as to Counts 2 and 3 (TT II 73), but denied as to the first count. (TT II 71). In addition, a defense motion to dismiss Count I pursuant to Rule 12 (b) (2) of the Federal Rules of Criminal Procedure (TT III 3) was denied. (TT IV 3-9).

The Defendant renewed his motion for a judgment of acquittal at the conclusion of his case (TT V 32) and again after the government's rebuttal (TT VI 19). However, the court denied both motions. (TT V 37; VI 19).

During closing arguments, the Assistant United States Attorney twice asked the jury to consider why the Defendant did not present additional, and different types of, character witnesses. (TT VI 40, 78). The second time

this contention was made the defense attorney objected (TT VI 78) and moved for a mistrial (TT VI 82). This motion was subsequently denied. (TT VI 83).

In addition, defense counsel objected to the Court's failure to instruct the jury on the Defendant's theory of the case (TT VI 102), which was submitted to the Court in Defendant's Request to Charge Number 1. (See Appendix). Moreover, the Court denied Defendant's renewed Motion to Dismiss, based on selective prosecution (See Appendix), as well as his Motion for New Trial (See Appendix).

ARGUMENT

I. WHEN A DEFENDANT ESTABLISHES A *PRIMA FACIE* CASE OF IMPERMISSIBLE SELECTIVE PROSECUTION AND THE GOVERNMENT FAILS TO PROVIDE A SATISFACTORY EXPLANATION, THE INDICTMENT MUST BE DISMISSED DUE TO THIS CONSTITUTIONAL IMPROPRIETY.

The Fourteenth Amendment to the United States Constitution prohibits a state from taking action which would "deny to any person within its jurisdiction the equal protection of the laws." This admonition is applicable to the federal government through the Fifth Amendment. *Bolling v Sharpe*, 347 US 497, 74 S Ct 693, 98 LEd 884 (1954); *Washington v United States*, 401 F2d 915 (D.C. Cir 1968).

The guarantee of equal protection of the laws is "not limited to the enactment of fair and impartial legislation, but necessarily extends to the application of these laws." *United States v Falk*, 479 F2d 616, 618 (7th Cir *en banc* 1973).

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, to denial of equal justice is still within the prohibition of the Constitution. *Yick Wo v Hopkins*, 118 US 356, 373-374, 6 S Ct 1064, 30 LEd 220 (1886).[11] *See also, United States v Robinson*, 311 FSupp 1063 (W.D. Mo. 1969).

To support a defense of selective or discriminatory prosecution, the defendant must, *prima facie*, establish the following:

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the exercise of constitutional rights.

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[11] In *Yick Wo*, a city licensing ordinance, though on its face a fair and reasonable exercise of police power was principally utilized to the detriment of Chinese. The case was concerned with an abuse of discretion in the administration of the ordinance by the governing board, and not with the activities of law enforcement officials who apparently prosecuted all Chinese who violated the commands of the board. The underlying principle has nevertheless been properly held to apply to the actions of prosecutors and police officials. *Two Guys from Harrison-Allentown, Inc. v McGinley*, 366 US 582, 81 S Ct 1135, 6 LEd 2d 551 (1961); *United States v Crowthers*, 456 F2d 1074 (4th Cir 1972); *Shock v Tester*, 230 F2d 935 (6th Cir 1956).

> These two essential elements are sometimes referred to as "intentional and purposeful discrimination." *United States v Berrios*, 501 F2d 1207, 1211 (2d Cir 1974). *See also, United States v Swanson*, 507 F2d 1205 (8th Cir 1975); *United States v Henderson*, 386 FSupp 1048 (S.D. N.Y. 1974).

Applying these legal maxims to the appeal at bar, it is quite apparent your Petitioner satisfied this burden of proof. After an evidentiary hearing on this issue, the Court below adroitly concluded "[i]n all previous circumstances. . .the Customs Department has proceeded administratively without result in criminal prosecution." (EHT 210)[12]

More specifically, William Rearick, a supervisory customs inspector (EHT 108) with twelve years of experience (EHT 116), testified he had never seen an instance where "harmless" merchandise (EHT 210) was involved and not handled in an administrative fashion. (EHT 116-117, 215). Furthermore, after "a thorough search of their files," (EHT 215) the government could only produce three cases in the preceding seventeen years where a criminal prosecution was instituted. (EHT 144-145, 192, 215).

It should be noted that the facts and circumstances surrounding these three prosecutions differ significantly from the one at bar. Two instances involved whiskey: one defendant was a notorious gambler (EHT 148) and

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[12] In fact, administrative action was also taken against Mr. Stern to the extent of a one hundred percent penalty and the seizure of this automobile. (EHT 52, 115, 116, 210).

the other had a long criminal record (EHT 149). This prosecution was justified because the person had been apprehended on three prior occasions "for the same type of offense." (EHT 161). However, in the instant matter, Donald Martin Stern had no prior criminal record. (EHT 211; TT IV 72)

Moreover, the third case involved jewelry which was intentionally concealed on the person inside an undergarment.[13] (EHT 144). However, the merchandise herein was clearly displayed in the trunk; there were no blankets or other objects present to obstruct the view nor any indicia of an intent to conceal (TT I 79, 101, 105, 106; II 22).

Furthermore, it was initially decided to proceed against your Petitioner in an administrative fashion (EHT 114). This decision was made after other sanctions were considered and rejected (EHT 114, 116) and was arrived at by applying the standards "as set forth by the Chief Inspector's Office." (EHT 117).

Nonetheless, when Special Agent Clifford Best arrived it was decided Mr. Stern would be arrested. (EHT 49-50).[14] "One possible explanation," the Court below concluded for this course of conduct, was that "Agent Best, who played a principal role in executing the arrest and in seeking criminal sanctions against the defendant, had developed a personal dislike for defendant stemming from an extensive investigation conducted by Best into defendant's operation as a Customs broker. Not-

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[13] This prosecution was subsequently dismissed. (EHT 144).

[14] See Footnote 5, *supra*.

withstanding Best's efforts, no action had been taken against the defendant. . .to Best's obvious disappointment." (EHT 210).

Moreover, "in shocking contrast to the usual treatment of arrested violators," (EHT 211) Donald Martin Stern was handcuffed and incarcerated in the Wayne County Jail (EHT 50, 211). Incredibly, this occurred even though persons accused of certain narcotics offenses were routinely released on their own personal recognizance (EHT 164-165). Significantly, "[n]o adequate or even candid explanation was offered by Government witnesses for the special treatment of the defendant in this regard." (EHT 211).

In addition, the testimony indicated your Defendant "Was a special person to the Customs Department" (EHT 135) and the "unusual" treatment he received was being done to teach him a lesson (EHT 135). This conduct is attributable, in no small part, to the reprimand Agent Best received as a result of the complaints made by Mr. Stern and his attorney for the unorthodox manner in which he was conducting the previous investigation.[15] (EHT 40-42, 154-155).

Furthermore, on at least two occasions, Clifford Best felt obligated to explain the "special" treatment accorded your Petitioner was not a result of his being Jewish (EHT

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[15] "An enforcement procedure that focuses upon the vocal offender is inherently suspect, since it is vulnerable to the charge that those chosen for prosecution are being punished for their [exercise of] a constitutionally protected right." *United States v Steele*, 461 F2d 1148, 1152 (9th Cir 1972). *See also, United States v Falk, supra*.

58, 136). These statements were unprovoked and their import so obvious no explanation need be provided.[16]

Accordingly, it is evident Donald Martin Stern carried his burden and established that he was discriminatorily selected for criminal prosecution and that this decision was invidious, intentional and based on the impermissible considerations herein described. Therefore, the burden of "going forward with proof of non-discrimination" now shifts to the government. *United States v Falk, supra*, 479 F2d at 624. An examination of the proceedings below indicate the record is completely barren of a proper, non-discriminatory basis for the prosecution at bar.

The trial court concluded "that it is not clear . . . even after hearing the testimony, exactly why in this case a criminal prosecution was . . . brought." (EHT 210). In addition, it was of the opinion that "this prosecution . . . must certainly be regarded as a monument to misguided zeal and bad judgment." (EHT 211).

Although the government argued the case at bar occurred as a result of prosecutorial discretion (EHT 3), the courts have stated this "answer will simply not suffice." *United States v Steele, supra*, 461 F2d at 1152. Rather, they examine the underlying circumstances surrounding the decision to prosecute because "[t]he judiciary has always borne the basic responsibility for

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[16] The making of such statements are not a usual occurrence in the Customs Department (EHT 97). Even the Assistant United States Attorney felt compelled to state "Mr. Best made a statement which bothers me and should bother the Court, a statement which was improper and out of order." (EHT 215). In fact, the Court's disgust with this remark was apparent in its opinion that it was "like the usually used statement, 'Some of my best friends are Jewish' " (EHT 214).

protecting individuals against unconstitutional invasions of their rights by all branches of the Government." *Stramler v Willis*, 415 F2d 1365, 1369-1370 (7th Cir 1969); *cert denied sub nom. Ichard v Stamler*, 399 US 929, 90 S Ct 2231, 26 LEd 2d 796 (1970).

While the government contends the instant prosecution is proper under *Olyer v Boles*, 368 US 448, 456, 82 S Ct 501, 7 LEd 2d 446 (1962), that case merely held that the selective enforcement of a criminal statute was not in itself a constitutional violation unless "the selection was deliberately based upon unjustifiable standard such as race, religion, or other arbitrary classification."[17] Accordingly, *Olyer* "does not preclude the granting of relief if there is intentional or purposeful discrimination against an individual.[18] *CF.*, *Furman v Georgia*, 408 US 238, 257, 293, 92 S Ct. 2726, 33 LEd 2d 346 (1972); *Snowden v Hughes*, 321 US 1, 8, 64 S Ct. 397, 88 LEd 497 (1944)." *United States v Yingling*, 368 F Supp

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[17] In *Olyer* petitioner attacked the validity of a state habitual offender criminal statute and its concomitant increased penalties. However, unlike the instant appeal, there "was no allegation by petitioner of purposeful discrimination against him as an individual. It was merely argued, from statistics, that more severe penalties were sought in a minority of the multiple offender cases. This, it was contended, denied equal protection to those persons against whom the heavier penalty was enforced." *Moss v Hornig*, 314 F2d 89, 93 (2nd Cir 1963).

[18] The court in *United States v Falk, supra*, noted its "disapproval of . . . simply dismissing all allegations of illegal discrimination in the enforcement of criminal laws with a reference to *Olyer v Boles, supra*, and its statement that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution. That correct principle does not in many cases answer the question whether selective enforcement in a given case is invidious discrimination which cannot be reconciled with the principles of equal protection." *Id* at 624.

379 (W.D. Pa 1973). *See also, United States v Falk, supra*; *Moss v Hornig*, 314 F2d 89 (2d Cir 1963).

Therefore, the government's failure to satisfy the burden and provide an adequate explanation must result in the dismissal of the instant Indictment.

> Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicabilit . *United States v Berrios, supra*, 501 F2d at 1209. *See also, Lennon v United States*, 387 F Supp 561 (S.D. N.Y. 1975).

II. IT IS ERROR TO SUBMIT A CASE TO THE JURY WHEN THE EVIDENCE AT MOST ESTABLISHES NO MORE THAN A CHOICE OF REASONABLE PROBABILITIES, ONE CRIMINAL AND THE OTHER INNOCENT.

DONALD MARTIN STERN was found guilty, after trial by jury, of fraudulent and knowing failure to manifest or declare merchandise, or failure to declare all articles brought into the United States, in violation of 18 USC §545 (TT VI 105). Petitioner submits the proofs adduced below did not establish, with the degree of certainty required for submission to the jury, that he acted with the elemental specific intent and willfulness mandated by the aforementioned criminal offense.

A declaration is fraudulent if made with an intent to deceive. *United States v Lepowitch*, 318 US 702, 63 S Ct 914, 87 LEd 1091 (1943); *United States v Cohn*, 270 US 339, 46 S Ct 251, 70 LEd 616 (1926); *United States v Costello*, 275 F2d 355 (2d Cir 1960), *aff'd* 365 US 265, 81 S Ct 534, 5 LEd 2d 551 (1961). In order to establish that Petitioner acted with this state of mind, the government must demonstrate he proceeded willfully,[19] with the specific intent[20] to deceive, *United States v Industrial Laboratories Co.*, 456 F2d 908 (10th Cir 1972); *Beaudine v United States*, 368 F2d 417 (5th Cir 1966); *United States v Thompson*, 366 F2d 167 (6th Cir 1966), *cert denied*, 385 US 973, 87 S Ct 512, 17 LEd 2d 436 (1966); *Beck v United States*, 305 F2d 595 (10th Cir 1962), *cert denied*, 371 US 890, 83 S Ct 186, 9 LEd 2d 123 (1962), and not as a result of mistake, accident or other innocent reason. *Screws v United States*, 325 US 91, 65 S Ct 1031, 89 LEd 1495 (1945); *Browder v United States*, 312 US 335, 61 S Ct 599, 85 LEd 862 (1941); *Standard Oil Company of Texas v United States*, 307 F2d 120 (5th Cir 1962).

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[19] "An act is done 'willfully' if done voluntarily and intentionally, and with the specific intent to do something the law forbids." *United States v Krosky*, 418 F2d 65, 67 (6th Cir 1969). *See also, United States v Bishop*, 412 US 346, 93 S Ct 2008, 36 LEd 2d 941 (1973); *Rosen v United States*, 161 US 29, 16 S Ct 434, 40 LEd 606 (1896); *Haner v United States*, 315 F2d 792 (5th Cir 1963).

[20] Specific intent means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant "knowingly failed to do an act which the law requires, intending with evil motive or bad purpose either to disobey or disregard the law." *United States v Sacco*, 428 F2d 264, 272 (9th Cir 1970), *cert denied* 400 US 903, 91 S Ct 141, 27 LEd 2d 140 (1970), *reh denied*, 401 US 926, 91 S Ct 864, 27 LEd 2d 831 (1971); *United States v Porter*, 431 F2d 7, 9 (9th Cir 1970) *cert denied*, 400 US 960, 91 S Ct 360, 27 LEd 2d 269 (1971).

The evidence produced against Donald Martin Stern was, in a very real sense, circumstantial in nature. Although the actual transactions and statements at the customs checkpoint were proven to have occurred, the significance of these matters (*i.e.*, Petitioner's intent and state of mind) must be ascertained circumstantially from the surrounding facts and circumstance. To find Mr. Stern guilty, the jury would have had to conclude, beyond a reasonable doubt, that the proofs excluded every reasonable theory except that of guilt. *Jensen v United States*, 403 F2d 1018 (9th Cir 1968); *Barnard v United States*, 342 F2d 309 (9th Cir 1965); *Kaplan v United States*, 329 F2d 561 (9th Cir 1964).

At trial, the testimony indicated that when your Petitioner reached the customs inspector, he was suffering severe pain from his eye injury. (TT IV 60, 70-71, 73). In addition, the car radio was tuned to a football game (TT IV 59, 73, 89). It is quite reasonable to believe these factors, as well as the peculiarity of Mr. Stern's watch (TT IV 73, 85, 86, 88), lead to a misunderstanding of the inspector's question.[21]

Moreover, as soon as he realized a mistake had been made, Petitioner apologized and began to make a declaration. (TT I78; IV 61, 74; V 7). In addition, the merchandise was not secreted within the vehicle or covered by other objects. Rather, it was clearly displayed and immediately visible inside the trunk. (TT I 79, 101, 105, 106; II 22).

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[21] It is significant to note the inspector himself was not one hundred percent sure of exactly what his question was. *See* Footnote 7, *supra*.

Furthermore, Donald Martin Stern frequently traveled to Canada (TT— IV 69) and knew there was a reasonable possibility his car would be searched (TT IV 69). In fact, he had been "examined" on several prior occasions. (TT IV 94).

Significantly, Mr. Stern was of the belief the Bureau of Customs was conducting "more and more" searches as a result of increased narcotics trafficking (TT IV 95-96). Also, due to the season and the Great Lakes' shipping schedule, he felt his chances of being examined were greater. (TT IV 96).

Your Petitioner also believed that if he acted contrary to the customs laws, he would lose his broker's license and livelihood. (TT IV 82; V 23, 25). It is highly unlikely Donald Stern would knowingly and intentionally subject himself to such severe sanctions for a mere $68.00 duty.[22]

This record hardly establishes Petitioner acted with the requisite "evil motive or bad purpose either to disobey or disregard the law."[23] *United States v Porter, supra*, 431 F2d at 7; *United States v Sacco, supra*, 428 F2d at 272.

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[22] Interestingly, the government, in rebuttal, failed to present any evidence which countered your Petitioner's theory of the case. Furthermore, Petitioner recognizes and accepts the legal maxim that "ignorance of the law is no excuse." *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68, 30 S. Ct. 663, 54 L.Ed. 930 (1910). However, the Sixth Circuit would expand this principle and create a "sliding scale" approach, wherein the presumption that each person is acquainted with the law would be altered to fit his education and profession. (Order, May 4, 1977, page 1). This modification of the aforementioned rule is both novel and impermissible, in that your Petitioner is unaware that this or any other Court has approved of such a position.

[23] The fact an amended declaration was accepted (TT IV 46-47, 55, 81) is indicative of the inspector's belief Mr. Stern was not acting with a criminal intent.

Quite to the contrary, the evidence "at most establishes no more than a choice of reasonable possibilities or inferences, one criminal and the other innocent." *United States v Leon*, 534 F2d 667, 677 (6th Cir 1976); *United States v Saunders*, 325 F2d 840, 843 (6th Cir 1964), *cert denied*, 379 US 978, 85 S Ct 677, 13 LEd 2d 568 (1965). Accordingly, the verdict of guilty cannot stand on appeal.

> Where the evidence as to an element of a crime is equally consistent with a theory of innocence as with a theory of guilt, that evidence necessarily fails to establish guilt beyond a reasonable doubt. *United States v Leon, supra*, 534 F2d at 677; *United States v Delay*, 440 F2d 566, 568 (7th Cir 1971).

III. THE GOVERNMENT'S ARGUMENT TO THE JURY ON DEFENDANT'S FAILURE TO PRODUCE CERTAIN PERSONS AS CHARACTER WITNESSES WAS AN IMPERMISSIBLE COMMENT ON HIS RIGHT TO REMAIN SILENT AND AN ERRONEOUS ATTEMPT TO SHIFT THE BURDEN OF PROOF TO HIM.

During closing arguments, the Assistant United States Attorney twice asked the jury to consider why the Defendant did not present additional and different types of character witnesses. (TT VI 40, 78). The second time this contention was made defense attorney objected (TT VI 78) and moved for a mistrial (TT VI 82), which was subsequently denied. (TT VI 83).

However, these remarks impermissibly commented on Donald Stern's right to remain silent and was an erroneous attempt to shift the burden of proof to him. *Cf., Griffin v California*, 380 US 609, 85 S Ct 1229, 14 LEd 2d 106 (1965). Moreover, the trial court failed to admonish the jury or give a cautionary instruction. *See, Middleton v United States*, 49 F2d 538 (8th Cir 1931).

Furthermore, the fact these comments were made twice magnified the error and had a cumulative effect upon the jury. *United States v Smith*, 500 F2d 293 (6th Cir 1974); *Volkmor v United States*, 13 F2d 594 (6th Cir 1926). In fact, this Circuit has recognized that even a "single misstep on the part of the prosecution may be so destructive of the right of the defendant to a fair trial that reversal must follow." *Pierce v United States*, 86 F2d 949, 952 (6th Cir 1926). Accordingly, these errors cannot be termed "harmless" beyond a reasonable doubt, *Chapman v United States*, 386 US 18, 87 S Ct 824, 17 LEd 2d 705 (1967), especially in light of the overwhelming nature of the evidence. (See Argument II, *supra*.)

IV. FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY AS TO DEFENDANT'S THEORY OF THE CASE IN REVERSIBLE ERROR.

It is a well-established legal maxim that a Defendant in a criminal prosecution "is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence." *Perez v United States*, 297 F2d 12, 13-14 (5th Cir 1961). Accordingly, "[w]here the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory." *Levine v United States*, 261 F2d 747, 748-749 (D.C. Cir 1958). *See also, Bird v United States*, 180 US 356, 21 S Ct 403, 45 LEd 570 (1901); *United States v Indian Trailer Corp.*, 226 F2d 595 (7th Cir 1955).

> We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own. *United States v Young*, 464 F2d 160, 164 (5th Cir 1972); *United States v Garcia*, 452 F2d 419, 423 (5th Cir 1971); *Strass v United States*, 376 F2d 416, 419 (5th Cir 1967); *Tatum v United States*, 190 F2d 612, 617 (D.C. Cir 1950).

In the instant trial, the court refused to instruct the jury on Defendant's Theory of Defense (TT VI 102). Petitioner's objection was noted on the record (TT VI 102) and this failure constitutes reversible error.

> The theory of the defendant must be stated clearly and completely. A charge is erroneous if it ignores a defense claimed as to which there is evidence before the jury. *Smith v United States*, 230 F2d 935, 939 (6th Cir 1956). *See also, Griego v United States*, 298 F2d 845 (10th Cir 1962).

V. IT IS ERROR FOR AN INDICTMENT NOT TO CONTAIN THE CITATION OF PERTINENT AND NECESSARY REGULATIONS WHICH PROSCRIBE THE CONDUCT ALLEGED THEREIN.

An Indictment shall contain the "official or customary citation of the statute, rule, regulation or other provision

of law which the defendant is alleged therein to have violated." F.R.Cr. P. 7 (c) (1). One of the purposes of this rule is "to aid a defendant in clearly understanding the charge against him." *United States v De Sapio*, 299 F Supp. 436, 447 (S.D. N.Y. 1969).

Although failure to state the citation is harmless unless the omission "mislead the defendant to his prejudice," F.R.Cr. P. 7 (c) (3), it is nonetheless "a matter of good practice" for the indictment to specifically refer to particular sections alleged to have been breached. *Webb v United States*, 369 F2d 530, 536 (5th Cir 1966).

In the instant case, the first paragraph of Count I alleges Petitioner "failed to manifest or declare merchandise which he carried into the United States on a vehicle, in violation of Section 1459, Title 19 United States Code, and Customs regulations promulgated thereunder." However, this statute provides that an individual, who is not a "master of any vessel," importing or bringing merchandise into this country "shall present such merchandise to such customs officer for inspection." Accordingly, the language proscribed by the statute is not contained in the indictment and a probe of the regulations is required.

Moreover, subparagraph 2 of Count I states Mr. Stern "failed to declare all articles which he brought into the United States, in violation of Section 1498 (a) (6), Title 19 United States Code, and Customs regulations promulgated thereunder." Yet, this statute merely provides the "Secretary of the Treasury is authorized to prescribed rules and regulations for the declaration and entry of . . . articles carried on the person or contained in the baggage of a person arriving in the United States." Therefore, an examination of the regulations must be had to ascertain exactly what was proscribed.

However, the indictment herein contains neither the regulations or their identifying number. As such, the Petitioner is not afforded his Sixth Amendment right to be reasonably apprised of the nature of the accusation against him. *Russell v United States*, 369 US 749, 82 S Ct 1038, 8 LEd 2d 1038 (1962). In addition, the indictment fails to state an offense. F.R.Cr. P. 12 (b) (2). Therefore, Defendant's motion to dismiss (TT III 3) should have been granted, especially in light of the confusion and prejudice had by Defendant regarding closing argument and jury instruction. (TT VI 102-103).

RELIEF REQUESTED

WHEREFORE, the Petitioner DONALD MARTIN STERN respectfully prays that this Honorable Court grant his Petition for Writ of Certiorari to consider the important legal issues contained herein.

Respectfully submitted,

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BURDICK AND McNEILL, P.C.
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OF COUNSEL:

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APPENDIX

RELEVANT DOCKET ENTRIES

1972

Dec. 7. Indictment and report filed.

Dec. 21. Defendant arraigned on indictment.

1973

Jan. 10. Pretrial held.

Feb. 16. Defendant's motion to dismiss indictment filed.

Mar. 9. Hearing on motion to dismiss indictment commenced.

Apr. 12. Order denying defendant's motion to dismiss filed.

July 10. Jury trial commenced.

July 18. Verdict of guilty returned by jury.

July 20. Defendant's motion for new trial or for order of dismissal filed.

1976

Jan. 15. Defendant's motion for new trial or for order of dismissal denied.

Jan. 22. Judgment and probation order entered.

1977

May 4. Order, United States Court of Appeals for the Sixth Circuit, denying Defendant's Appeal.

INDICTMENT

(United States District Court,
Eastern District of Michigan,
Southern Division)

(U.S.A., Plaintiff vs. Donald Martin Stern, Defendant)

(Filed December 7, 1972)

THE GRAND JURY CHARGES:

COUNT ONE

That on or about the 12th day of November, 1972, in the Eastern District of Michigan, Southern Division, DONALD MARTIN STERN, defendant herein, fraudulently or knowingly did import or bring merchandise, that is, various pieces of clothing, china, antiques, and decorative brass and copper ware, into the United States contrary to law, in that:

(1) said defendant, DONALD MARTIN STERN, failed to manifest or declare merchandise which he carried into the United States on a vehicle, in violation of Section 1459, Title 19 United States Code, and Customs regulations promulgated thereunder, or

(2) said defendant, DONALD MARTIN STERN, failed to declare all articles which he brought into the United States, in violation of Section 1498(a) (6), Title 19 United States Code, and Customs regulations promulgated thereunder;

in violation of Section 545, Title 18 United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT TWO

That on or about the 12th day of November, 1972, in the Eastern District of Michigan, Southern Division, DONALD MARTIN STERN, defendant herein, wilfully and knowlingly did enter or introduce, or attempt to enter or introduce into the commerce of the United States, imported merchandise, that is, various pieces of toys, clothing, china, antiques, and decorative brass and copper ware, by means of a false and fraudulent declaration to United States Customs Inspector, Alan J. Zelton, that the said merchandise had been purchased for approximately Four Hundred Dollars ($400.00), whereas, in truth and fact, as DONALD MARTIN STERN well knew, the said merchandise had been purchased for approximately Eight Hundred Sixteen Canadian Dollars ($816.00) Eight Hundred Twenty-nine United States Dollars ($829.00); in violation of Section 542, Title 18 United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT THREE

That on or about the 12th day of November, 1972, in the Eastern District of Michigan, Southern Division, DONALD MARTIN STERN, defendant herein, wilfully and knowingly did enter or introduce, or attempt to enter or introduce, into the commerce of the United States, imported merchandise, that is, various pieces of toys, clothing, china, antiques, and decorative brass and copper ware, by means of a false and fraudulent declaration to United States Customs Inspector, Peter E. Sirosky, that the said merchandise was valued at approximately Five Hundred Dollars ($500.00), whereas,

in truth and fact, as DONALD MARTIN STERN well knew, the said merchandise had been purchased for approximately Eight Hundred Sixteen Canadian Dollars ($816.00) (Eight Hundred Twenty-nine United States Dollars ($829.00)); in violation of Section 542, Title 18 United States Code.

FINDINGS OF FACT AND OPINION
DENYING MOTION TO DISMISS INDICTMENT

(United States District Court,
Eastern District of Michigan,
Southern Division)

(U.S.A., Plaintiff vs. Donald Martin Stern, Defendant)

(Filed April 12, 1973)

(208) The Court: The Court in this case of United States of America versus Donald Stern has before it the defendant's Motion to Dismiss the indictment against him on the grounds that the Government is guilty of discriminatory prosecution. The defendant alleges that the prosecution against him, a Customs broker by occupation, is the result of a personal vendetta waged against him by the United States Treasury Department because of the personal animosity of Special Agent Clifford Best.

In response to the Motion, Mr. Alan Harnisch, the Assistant U. S. Attorney, has filed an affidavit in which he states that his decision to prosecute the defendant was not based on any arbitrary consideration, but on the following factors: One, the belief that the defendant is in

fact guilty; two, that there is reasonable probability that the defendant will be convicted; and three, the (209) belief that justice will be served by this conviction.

In their briefs, the parties both cite the same authority as controlling the merits of the defendant's contention, that being 4 ALR 3rd 404 and following. That annotation sets forth the elements which the defendant must be able to show in order for his contention of discriminatory prosecution to succeed. It reads as follows and I quote:

> "It is insufficient merely to show that the other offenders had not been prosecuted or that there had been laxity of enforcement or that there has been a conscious exercise of selectivity in enforcement, but there must be sufficient evidence to establish the existence of intention or purposeful discrimination which is deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification."

I believe the parties are agreed as to the applicable law for determining whether a prosecution is proper in the respect alleged. An evidentiary hearing was held for the purpose of determining whether such impermissible discrimination existed. The hearing revealed that the prosecution involved here is at best unique.

The defendant is accused of Customs violations in (210) connection with his entry into the United States on November 12, 1972. He is charged with importing certain merchandise without properly declaring it. The merchandise in question is harmless, consisting of toys, antiques, china and clothing. Had he properly declared these items, the duty owing would have amounted to $68.00. The defendant does not have a prior criminal record. In all previous similar circumstances involving

other such offenders, the Customs Department has proceeded administratively without result in criminal prosecution. Administrative action has also been taken against Mr. Stern to the extent of a one hundred percent penalty and the seizure of his automobile.

I might point out that it is not clear to the Court, even after hearing the testimony, exactly why in this case a criminal prosecution was also brought. One possible explanation is that Special Agent Clifford Best, who played a principal role in executing the arrest and in seeking criminal sanctions against the defendant, had developed a personal dislike for defendant stemming from an extensive investigation conducted by Best into the defendant's operation as a Customs broker. Notwithstanding Best's efforts, no action had been taken against the defendant at that time and I believe even to this time, to Best's obvious disappointment. Best's personal (211) feelings toward the defendant were reflected in the unnecessarily harsh treatment meeted out to the defendant at the apparent initiative of Best immediately following his arrest. For in spite of a clean prior record and notwithstanding his obviously deep roots in the community which were known to Best and the other Agents involved, the defendant was incarcerated over night in the Wayne County Jail. Even the vigorous efforts of Mr. Rosenthal, defendant's attorney, to secure defendant's release on bond were to no avail until the following morning.

Now, this is in shocking contrast to the usual treatment of arrested violators. There was testimony that even some charged with smuggling narcotics are not incarcerated. No adequate or even candid explanation was offered by Government witnesses for the special treatment of the defendant in this regard.

To the extent that the animosity of Agent Best toward defendant might explain the Government's decision to proceed against him, this prosecution, in the opinion of the Court, from what it has heard, must certainly be regarded as a monument to misguided zeal and bad judgment. The affidavit of Mr. Harnisch, the Assistant U. S. Attorney, as he has argued to the Court, points out that the decision to prosecute was his and that he decided to prosecute because he believed there was flagrant violation of the (212) law. And as the Court said in United States vs. Mano, 118 F. Supp. 511, at 515, and I quote:

> "It is the defendant's contention that the Internal Revenue officials have discriminated against so called racketeers, singling their cases out for prosecution and not utilizing the statutory power of compromise. In support of their position, the defendants have cited cases outlining the proper administration of Government. But none of them touches closely to the instant case. These decisions may be summed up by saying that citizens are entitled to equal protection of the law. But these decisions do not hold that citizens are entitled to equal protection from the laws. The fact that not all criminals are prosecuted is no valid defense to one prosecuted. As the Government points out in many cases supporting its position, the administration of such matter lies in the discretion of a prosecuting attorney. The Government also calls attention to the fact that the designation of racketeer type is unrelated to the return of indictments by grand juries who have no knowledge of the Treasury Depart- (213) ment's characterization of the case. Long ago, the Supreme Court, in the In Re Confiscation cases, 74 U.S. 454; 19 Law Edition 196, took this position:

> 'Public prosecutions, until they come before the Court to which they are returnable, are within the exclusive discretion of the district attorney'."

In a suit where the United States sought forfeiture of an automobile, Judge Sparks stated in United States v. One 1940 Oldsmobile, and I quote:

> "There is quite a large discretion vested in a district attorney to resubmit a presentment to the grand jury or to subsequent grand juries and this is not subject to control of the district courts."

However, once having said that, I suggest that at the very least, the Customs Department policy which permitted and condoned the harsh post-arrest treatment of the defendant should be examined and reformed. I say this because of what I heard from the witness stand in the course of this hearing. For example, I have never heard such equivocation of testimony, especially from Agents of a Federal Agency. What I'm referring to is (214) this: First, the hesitation on the part of the witnesses to answer many of the questions; two, the evasive answers; and at least twice, Agent Best answered that he couldn't figure out what the attorney was getting at. In both of those cases, the Court had to admonish and warn him that it was not for him to figure out what the attorney was getting at but to answer the question. Thirdly, the testimony with regard to the file in this case. Agent Best first said it was in his office and then when the Court indicated it would call a recess to allow him to get the file so that it could be reviewed in camera, he said it was on the table. I can't conceive of an Agent bringing a file over for a hearing, putting it on counsel table and then a few minutes later saying it is in his office. Four, the testimony by Mr. Best that a felony was committed in his presence when he was called there after

the defendant had been stopped by the Agents at the Tunnel. Five, Agent Best's testimony and the evidence presented relative to his remarks about an attorney. Six, Agent Best's testimony about his statement to Mr. Stern relative to the fact that, "You probably think I'm doing this because you are Jewish, but that isn't so", or remarks to that effect. In the opinion of the Court, this is like the usually used statement, "Some of my best friends are Jewish". Even Mr. Harnisch, in his closing argument, (215) stated, and I quote, "Mr. Best made a statement which bothers me and should bother the Court, a statement which was improper and out of order." Seven, the fact that Mr. Eshelman, in the car at the time that the statement admitted by Mr. Best was made, heard so many things but didn't hear this statement. Eight, the testimony of Mr. Liming relative to the practice of arresting a person at the Tunnel or Bridge for such a violation in light of Mr. Rearick's testimony that in twelve years with Customs, he has never seen this happen, and the answer based on what I'm sure was a thorough search of their files and yet they could come up with only three arrests in the past seventeen years. And, lastly, the fact that the Assistant U. S. Attorney, Mr. Harnisch, at the request of the Agents, I'm sure, requested that the Agents be excused because there was so much work to be done and they needed to be allowed to leave so they could attend to their duties; yet despite this request which the Court granted, one Agent remained in the court room and one in the hallway.

Now, having said all that, the Court is now faced with the law which must guide this Court in resolving the issue before it. Based on that law, it does not appear to me that the conduct of the Government in this case reaches Constitutional proportions. While the proceedings (216) against the defendant may reflect bad judgment, they do not appear to be deliberately based upon an unjustifiable

standard such as race, religion or other arbitrary classification. What has been shown instead in a conscious exercise of selectivity in enforcement. Under the applicable rule, this does not warrant dismissal of the indictment.

In the case of Moss v. Hornig, 314 F2d 89, the Court stated and I quote:

> "Mere failure to prosecute other offenders is no basis for a finding of denial of equal protection. To show that unequal administration of a state statute offends the equal protection clause, one must show an intentional or purposeful discrimination. In Oiler vs. Bowles, 368 U.S., the Supreme Court rejecting Petitioner's contention that a selective enforcement of the West Virginia habitual offenders penalty statute was a denial of his right to equal protection, said, 'The conscious exercise of some selectivity in enforcement is not in itself a Federal Constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated (217) that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged.' The Oiler case seems to indicate that the relief for denial of equal protection is limited to cases where class discrimination is proved."

Now, the defense here has attempted to show that the proceedings against the defendant were prompted by anti-Semitism as based upon the statement which I referred to earlier. In the opinion of the Court, however, this theory has not been sufficiently substantiated by the evidence at the hearing. Accordingly, the Motion will be denied.

* * * * *

ORDER GRANTING MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNTS II AND III AND DENYING SAID MOTION AS TO COUNT I OF THE INDICTMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(U.S.A., Plaintiff v. Donald Martin Stern, Defendant. — No. 48103)

(Filed _____)

At a regular session of said Court, held in the Federal Building, Detroit, Michigan, on _____.

PRESENT: THE HONORABLE LAWRENCE GUBOW, District Judge.

The Defendant, at the close of the Government's proof, having made a Motion for Judgment of Acquittal as to all three Counts of the Indictment, oral argument having been heard, and the Court being of the opinion that the Government failed to make out a *prima facie* case as to Counts II and III, but did make out a *prima facie* case as to Count I of the Indictment and the Court otherwise being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Defendant's Motion for Judgment of Acquittal be and hereby is granted as to Counts II and III of the Indictment but is denied as to Count I of the Indictment.

LAWRENCE GUBOW
District Judge

ORDER DISMISSING MOTION FOR NEW TRIAL AND FOR ORDER OF DISMISSAL

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed January 15, 1976)

(U.S.A., Plaintiff v. Donald Martin Stern, Defendant. — No. 48103)

At a session of said court held at Detroit, Michigan, this 15th day of January, 1976.

PRESENT: HON. LAWRENCE GUBOW, U.S. District Judge.

For the reasons stated in the Memorandum Opinion Dismissing Motion for New Trial And Or Order of Dismissal entered in this case on this date,

IT IS ORDERED that the Defendant's motion for a new trial or for order of dismissal be, and hereby is, DENIED.

/s/ Lawrence Gubow
U.S. District Judge

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(U.S.A., Plaintiff v. Donald Martin Stern, Defendant. — No. 48103)

(Filed _____)

Before the court is a renewed motion to dismiss the indictment against Defendant DONALD STERN on the basis of *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). The Government has filed a memorandum in opposition to this motion.

DONALD MARTIN STERN was arrested on November 12, 1972 for a customs violation relating to his entry into the United States at the Detroit-Windsor Tunnel. He was indicted by a grand jury on December 7, 1972 and charged with a violation of 18 U.S.C. §545. Prior to the trial, an evidentiary hearing was conducted to determine if the criminal proceedings against the Defendant had been initiated in a discriminatory manner. At the conclusion of the testimony, the court summarized its findings as follows:

> "The hearing revealed that the prosecution involved here is at best unique. The defendant is accused of Customs violations in connection with his entry into the United States on November 12, 1972. He is charged with importing certain merchandise without properly declaring it. The merchandise in question is harmless, consisting of

toys, antiques, china and clothing. Had he properly declared these items, the duty owing would have amounted to $68.00. The defendant does not have a prior criminal record. In all previous similar circumstances involving others, they proceeded administratively without result in criminal prosecution. Administrative action has also been taken against Mr. Stern to the extent of a one hundred percent penalty and the seizure of his automobile.

I might point out that it is not clear to the Court, even after hearing the testimony, exactly why in this case a criminal prosecution was also brought. One possible explanation is that Special Agent Clifford Best, who played a principal role in executing the arrest and in seeking criminal sanctions against the defendant, had developed a personal dislike for defendant stemming from an extensive investigation conducted by Best into the defendant's operation as a Customs broker. Notwithstanding Best's efforts, no action had been taken against the defendant at that time and I believe even to this time, to Best's obvious disappointment. Best's personal feelings toward the defendant were reflected in the unnecessarily harsh treatment meeted (sic) out to the defendant at the apparent initiative of Best immediately following his arrest. For in spite of a clean prior record and notwithstanding his obviously deep roots in the community which were known to Best and the other Agents involved, the defendant was incarcerated over night (sic) in the Wayne County

Jail. Even the vigorous efforts of Mr. Rosenthal, defendant's attorney, to secure defendant's release on bond were to no avail until the following morning.

Now, this is in shocking contrast to the usual treatment of arrested violaters. There was testimony that even some (individuals) charged with smuggling narcotics are not incarcerated. No adequate or even candid explanation was offered by Government witnesses for the special treatment of the defendant in this regard.

To the extent that the animosity of Agent Best toward defendant might explain the Government's decision to proceed against him, this prosecution, in the opinion of the Court, from what it has heard, must certainly be regarded as a monument to misguided zeal and bad judgment. The affidavit of Mr. Harnish, the Assistant U.S. Attorney as he has argued to the Court, points out that the decision to prosecute was his and that he decided to prosecute because he believed "there was flagrant violation of the law . . ., I suggest that at the very least, the Customs Department policy which permitted and condoned the harsh post-arrest treatment of the defendant should be examined and reformed. I say this because of what I heard from the witness stand in the course of this hearing. For example, I have never heard such equivocation of testimony, especially from Agents of a Federal Agency. . . . First, the hesitation on the part of the witnesses to answer many of the questions; two, the evasive answers; and at least twice, Agent Best answered that he couldn't figure out what the attorney was getting

at. In both of those cases, the Court had to admonish and warn him that it was not for him to figure out what the attorney was getting at but to answer the question. Thirdly, the testimony with regard to the file in this case. Agent Best first said it was in his office and then when the Court indicated it would call a recess to allow him to get the file so that it could be reviewed in camera, he said it was on the table. I can't conceive of an Agent bringing a file over for a hearing, putting it on counsel table and then a few minutes later saying it is in his office. Four, the testimony by Mr. Best that a felony was committed in his presence when he was called there after the defendant had been stopped by the Agents at the Tunnel. Five, Agent Best's testimony and the evidence presented relative to his remarks about an attorney. Six, Agent Best's testimony about his statement to Mr. Stern relative to the fact that, 'You probably think I'm doing this because you are Jewish, but that isn't so', or remarks to that effect. In the opinion of the Court, this is like the usually used statement, 'Some of my best friends are Jewish'. . . . Seven, the fact that Mr. Eshelman, in the car at the time that the statement admitted by Mr. Best was made, heard so many things but didn't hear this statement. Eight, the testimony of Mr. Liming relative to the practice of arresting a person at the Tunnel or Bridge for such a violation in light of Mr. Rearick's testimony that in twelve years with Customs, he has never seen this happen, and the answer based on what I'm sure was a thorough search of their files and yet they could come up

with only three arrests in the past seventeen years. And, lastly, the fact that the Assistant U.S. Attorney, Mr. Harnisch, at the request of the Agents, I'm sure, requested that the Agents be excused because there was so much work to be done and they needed to be allowed to leave so they could attend to their duties; yet despite this request which the Court granted, one Agent remained in the court room and one in the hallway.

Now, having said all that, the Court is now faced with the law which must guide this Court in resolving the issue before it. Based on that law, it does not appear to me that the conduct of the Government in this case reaches Constitutional proportions. While the proceedings against the defendant may reflect bad judgment, they do not appear to be deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. What has been shown instead in (sic) (is) a conscious exercise of selectivity in enforcement. Under the applicable rule, this does not warrant dismissal of the indictment.

Now, the defense here has attempted to show that the proceedings against the defendant were prompted by anti-Semitism as based upon the statement which I referred to earlier. In the opinion of the Court, however, this theory has not been sufficiently substantiated by the evidence at the hearing. Accordingly, the Motion will be denied."

The Defendant was subsequently convicted following a jury trial of a violation of 18 U.S.C. §545. After the publication of *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973), the Defendant renewed his motion to dismiss the indictment. After requesting briefs from both parties on the applicability of *Falk* to the instant case, we took the matter under advisement.

The defense of discriminatory prosecution gained acceptance with the decision of the United States Supreme Court in *Yick Ho v. Hopkins*, 118 U.S. 356 (1886). The Court held that an impartial statute applied by authorities in an unjust and discriminatory manner to persons similarly situated violated the equal protection clause. In *Oyler v. Boles*, 368 U.S. 368 (1962), the Court held that the selective enforcement of a criminal statute was not in itself a constitutional violation unless the selection was based on an unjustifiable standard such as race or religion or some other such "arbitrary classification". *Oyler*, however, does not preclude granting relief for intentional or purposeful discrimination against an individual, *Moss v. Hornig*, 314 F.2d 89, 93 (2nd Cir. 1963).

In *United States v. Falk, supra*, the defendant was found guilty of failing to possess a selective service registration and draft classification cards. At trial, he attempted to prove that criminal proceedings had been initiated against him because of his anti-war and draft counseling activities, thus punishing him for the exercise of his First Amendment rights. The court held that, in view of the Government's past policy of penalizing individuals expressing anti-war sentiments, it was incumbent upon the Government to justify prosecuting Falk. The court outlined several factors establishing a prima facie case for selective prosecution: the delay in bringing the indictment against Falk, a statement by

the prosecution that part of Falk's troubles stemmed from his anti-war and draft-counseling activities, the fact that the prosecution had been carefully approved by a chain of command in the Department of Justice. Accordingly, the court remanded the case to the district court for evidentiary hearings with instructions to dismiss the indictment if the prosecution had been initiated for the purpose of chilling Falk's First Amendment rights.

Falk and post-*Falk* cases have not led to a broadening of the selective prosecution defense; a defendant raising this claim still has a heavy burden to overcome the presumption of regularity in the institution of criminal proceedings. He must show 1) that others similarly situated have not been proceeded against for the same type of conduct with which he is being charged and 2) that the Government's reason is discriminatory or in bad faith, being based on impermissible considerations such as race or religion or the desire to prevent exercise of constitutional rights, *United States v. Berrios*, 501 F.2d 1207, 1212 (2nd Cir. 1974). In *United States v. Ortego-Alvarez*, 506 F.2d 455 (2nd Cir. 1974) *cert denied* _____ U.S. _____, the court, citing the *Berrios* test, upheld convictions of conspiracy to violate the narcotics laws of the United States, refusing to set aside the convictions on the ground that one member of the conspiracy had been prosecuted while others had not.

In *United States v. Benson*, 509 F.2d 1205, 1208 (8th Cir. 1975), in reviewing two convictions for failure to file income tax returns, the court discussed the applicability of the selective prosecution defense where the Internal Revenue Service carried on a special program (ACE) to investigate the tax returns of attorneys, accountants and registered practitioners. The defendants had charged that the IRS' ACE program constituted an invidious discrimination which was arbitrary and capricious and

which had resulted in a disproportionate number of convictions among such individuals. The court found that the defendants had not shown that others similarly situated had not been prosecuted and that the Government's decision to proceed was invidious or made in bad faith. *See also*, *United States v. Beuchler*, 509 F.2d 13 (4th Cir. 1975), *cert denied* _____ U.S. _____.

In *United States v. Brookshire*, 514 F.2d 786 (10th Cir. 1975) rehearing denied, the defendant appealed his conviction for misapplication of bank funds through the use of interbank deposit slips, claiming that the federal statute under which he was convicted has never been used to prosecute others for such conduct and that the actions for which he was convicted, and that the record did not show that a general banking practice regarding the use of interbank deposit slips had been shown and that, even if such a practice did exist, custom and usage involving criminality did not defeat a criminal prosecution for violation of a criminal statute. Under *Brookshire*, as long as the charged conduct is proscribed by statute, no federal constitutional violation occurs when an individual is prosecuted even if there have been no prior prosecutions under the statute.

Thus, neither *Falk* nor the federal cases decided after *Falk* have extended the defense of discriminatory prosecution beyond the scope of *Oyler v. Boles*, *supra*.[1]

At the evidentiary hearing, this court did not find that the discrimination against STERN had constitutional proportions, despite indications that criminal proceedings

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[1] The Fifth Circuit has indicated that it does not intend to follow the *Falk* case, *United States v. Ream*, 491 F.2d 1243, 1246 (1974); *United States v. Raven*, 500 F.2d 728, 733 (1974).

against him might have been initiated because of the great personal animosity of the special agent originally involved in investigation of his business. The animosity is best shown by the unprecedented decision to hold Defendant overnight in the Wayne County Jail. Several instances of non-cooperation and obstructionist tactics by customs agents at the evidentiary hearing show bad faith. Moreover, the absence of criminal prosecutions (with three minor exceptions) during a seventeen year period is significant where it cannot be doubted that numerous customs violations had occurred and had been processed administratively during the same period. This court cannot condone conduct based on pettiness and personal vendettas on the part of Government agents.

However, the court will not do the Customs Department the injustice of assuming that it approves applying the customs laws with a heavy hand against one individual. Hopefully, the misguided zeal and bad judgment characterizing this case at its inception and at the evidentiary hearing were aberrations. In view of the great misconduct that the record amply demonstrates here, the court hopes that no further proceedings, as a result of this conviction, will be initiated against the Defendant.

Having carefully examined *Falk v United States* and recent case law, as well as the record, the court concludes that its original finding at the evidentiary hearing, to wit that the conduct of the Government in this case did not reach constitutional proportions sufficient to uphold the defense of discriminatory enforcement of the laws, must stand.

Accordingly, albeit with the utmost reluctance, the court denies Defendant's renewed motion to dismiss the indictment.

/s/ Lawrence Gubow
U.S. District Judge

Dated: Jan. 15, 1976

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(U.S.A., Plaintiff-Appellee, vs. Donald M. Stern, Defendant-Appellant — No. 76-2486)

(Filed May 4, 1977)

Before: PHILLIPS, Chief Judge, EDWARDS and PECK, Circuit Judges.

On receipt and consideration of an appeal from a conviction after jury trial for failure to declare merchandise brought into the United States, in violation of 18 U.S.C. §545 (1970), and a subsequent two-year sentence of unsupervised probation; and

Noting that appellant was a custom house broker by employment, and hence, could be presumed to be far more thoroughly acquainted with United States customs regulations than the average citizen; and

Noting further that there clearly was evidence before the District Court from which appellant's knowing violation of the customs law could have been found by the jury beyond reasonable doubt, and

Noting further the careful attention that the District Judge gave to appellant's arguments, 1) that appellant had been subjected to harassment by a special agent of the Bureau of Customs, Clifford Best, who had initiated his confinement overnight in the Wayne County Jail and had said to him at one point something to the effect that,

"You probably think I am doing this because you are Jewish, but that isn't so," and the District Judge condemned this action and this language in the strongest terms, but nonetheless, found no Constitutional violation in the criminal prosecution (as opposed to civil action to recover penalties) where there was no evidence that the United States Attorney's office was motivated by anything other than the facts of the offense and the obvious professional knowledge of the appellant; and

Noting further that in concluding his opinion denying a renewed motion to dismiss the indictment on the basis of *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc), District Judge Gubow said as follows:

> However, the court will not do the Customs Department the injustice of assuming that it approves applying the customs laws with a heavy hand against one individual. Hopefully, the misguided zeal and bad judgment characterizing this case at its inception and at the evidentiary hearing were aberrations. In view of the great misconduct that the record amply demonstrates here, the court hopes that no further proceedings, as a result of this conviction, will be initiated against the Defendant.

Having carefully examined *Falk v. United States* and recent case law, as well as the record, the court concludes that its original finding at the evidentiary hearing, to wit that the conduct of the Government in this case did not reach constitutional proportions sufficient to uphold the defense of discriminatory enforcement of the laws, must stand.

Accordingly, albeit with the utmost reluctance, the court denies Defendant's renewed motion to dismiss the indictment.

Now, therefore, this court affirms the judgment of the District Court for the reasons, including the dicta set forth in said Memorandum Opinion of January 15, 1976.

Entered by order of the Court

/s/ John D. Hehman
Clerk

No. 76-1708

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD MARTIN STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
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OPINIONS BELOW

The order of the court of appeals (Pet. App. 52-54) and the opinion of the district court (Pet. App. 43-51) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1977. The petition for a writ of certiorari was filed on May 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was the subject of unconstitutional selective prosecution.

2. Whether the evidence was sufficient to support petitioner's conviction.

3. Whether the prosecutor's comments in closing argument violated petitioner's right against self-incrimination.

4. Whether the trial court erred in refusing to instruct the jury as petitioner requested.

5. Whether the indictment was defective because it did not refer to pertinent regulations.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of one count of fraudulent or knowing failure to manifest or declare merchandise, in violation of 18 U.S.C. 545. Petitioner was sentenced to two years' probation. The court of appeals affirmed (Pet. App. 52-54).

1. On November 12, 1972, petitioner, a customs house broker returning from Canada, stopped at the primary inspection station of the Detroit-Windsor Tunnel. The United States Customs Inspector asked, "What are you bringing back from Canada?" Petitioner responded, "Nothing." After further questioning, the customs inspector asked, "And you didn't purchase anything?" Petitioner responded, "Some toys." The inspector then told petitioner to open the car's trunk. Inside, the inspector found clothing and merchandise. The inspector next asked petitioner how much he had spent in Canada and petitioner responded, "About $400.00." The inspector then sent petitioner to a secondary inspection station (Tr. I 74-80). At this station, petitioner listed the total value of his merchandise at $500.00; he was thereupon requested to take all of his merchandise to the Customs Office. After partial compliance, petitioner was instructed a second time to remove all of the merchandise from his car (Tr. II 8-9). At the customs station, petitioner listed the value of his goods at $400.00 to $500.00. Upon an examination of petitioner's

receipts, the customs agents determined that the actual value of the merchandise was in excess of $780.00. Petitioner was charged a duty and personal penalty (Tr. IV 41-43).

2. A pretrial hearing on petitioner's motion to dismiss the indictment on the basis of selective prosecution established that failure to declare personal property normally results in administrative action. In the previous 17 years only three criminal prosecutions had been brought in the Detroit area for knowing failure to declare merchandise other than weapons or narcotics. In this case, customs supervisor Gary Liming authorized petitioner's arrest for the following reasons:

> So it appears at least three, perhaps four occasions, he was offered an opportunity to make a clean or proper declaration and he did not do it. So this was the reason. And then and only then did we start considering the fact that he was a Customs house broker charged with the responsibility of upholding the Customs laws. And because of that, he was arrested. [E.T. 158.][1]

Petitioner was incarcerated overnight. The following morning, customs agent Clifford Best told petitioner, "Mr. Stern, you probably feel that what is happening to you is because you are Jewish. But let me assure you that it is not" (E.T. 58-65). Best had previously investigated petitioner although no action had been taken as a result (E.T. 14, 137-138, 150-151).

Petitioner subsequently was indicted by a grand jury. The prosecutor stated that his decision to prosecute was based on three factors:

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[1] "E.T." refers to the transcript of the evidentiary hearing.

> Number one, Donald Stern was in fact guilty of the offense as charged; number two, that there exists a reasonable probability that he would be convicted at trial; and number three, that the best interests of justice will be served by prosecution and conviction. [E.T. 191.]

Based on the evidence adduced at the hearing, the district court found that although agent Best's conduct was "a monument to misguided zeal and bad judgment," Best's ethnic comments and petitioner's overnight incarceration were not the result of anti-Semitism (Pet. App. 43-47). The district court further found that petitioner had shown nothing to indicate that the Assistant United States Attorney acted with improper motive in presenting evidence to the grand jury. The court therefore held that while the proceedings against petitioner "may reflect bad judgment" (Pet. App. 39), the prosecution was not based on religious considerations and did not amount to a constitutional violation (Pet. App. 39-40). The district court reaffirmed this holding in denying petitioner's motion for judgment of acquittal (Pet. App. 41-51). The court of appeals affirmed (Pet. App. 52-54).

ARGUMENT

1. Petitioner's contention (Pet. 15-22) that the prosecution was based on improper considerations is not supported by the evidence, as both courts below found. While we do not dispute the district court's conclusion that the acts of agent Best showed "misguided zeal and bad judgment" (Pet. App. 37), the prosecution stemmed from an independent review of the facts by the Assistant United States Attorney and his conclusion that a prosecution would serve "the best interests of justice" (E.T. 191).

In *Oyler* v. *Boles*, 368 U.S. 448, 456, this Court held that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." To prove an equal protection violation, petitioner must show that his prosecution was based on "an unjustifiable standard such as race, religion, or other arbitrary classification" (*Oyler* v. *Boles, supra,* 368 U.S. at 456) or an attempt to prevent exercise of constitutional rights (*United States* v. *Falk*, 479 F. 2d 616 (C.A. 7); *Moss* v. *Horning*, 314 F. 2d 89 (C.A. 2)). As both courts below concluded (Pet. App. 50-51, 52-54), petitioner did not make out such a violation here. The fact that few customs violations of this type result in prosecution "is not in itself a federal constitutional violation." *United States* v. *Brookshire*, 514 F. 2d 786, 788-789 (C.A. 10).

2. Petitioner's claim (Pet. 22-26) that the evidence was insufficient to support the conviction is without merit. He was given four opportunities to declare all of his purchases and each time either denied that he had purchased anything in Canada or understated the value of his goods. The government also introduced evidence to show that, as a licensed customs house broker, petitioner was or should have been aware of his obligation to declare goods being introduced into the United States. When viewed in the light most favorable to the government, there was sufficient evidence to prove petitioner's guilt beyond a reasonable doubt.

3. Petitioner also contends (Pet. 26-27) that his Fifth Amendment right to remain silent was violated when the prosecutor, in his closing argument, stated that petitioner's four character witnesses did not include business associates.[2] Since petitioner testified in his own defense,

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[2]Petitioner introduced four acquaintances who testified as to his reputation for veracity (Tr. IV 9-11, 12-15, 26-27, 34-36). In rebuttal, the government introduced three witnesses who testified that petitioner's reputation for honesty in his business affairs was not good (Tr. V 38-40, 45-46, 53-54).

the prosecutor's remark manifestly cannot be held a violation of *Griffin* v. *California*, 380 U.S. 609, as petitioner suggests they were. Nor was the prosecutor's statement an "attempt to shift the burden of proof" to petitioner (Pet. 26). In light of the fact that petitioner chose to put his character in issue, the prosecutor's comment was entirely proper. See Fed. R. Evid. 404(a)(1).

4. Petitioner argues (Pet. 27-28) that he was entitled to have the court present his "theory" of the case to the jury. Essentially, petitioner's defense was that he did not hear the customs inspector ask him if he had purchased anything in Canada and that he was not aware that the total value of his merchandise exceeded $500.00. This is not a "theory" but simply a denial of guilty knowledge. "What is required before the theory of the case rule comes into play is a more involved theory involving 'law' or fact, or both, that is not so obvious to any jury." *Laughlin* v. *United States*, 474 F. 2d 444, 455 (C.A.D.C.), certiorari denied, 412 U.S. 941.

5. Finally, petitioner contends (Pet. 28-30) that the indictment was insufficient because, while it specified the statutes alleged to have been violated, it did not specify pertinent regulations. Petitioner did not raise this issue until the trial was well under way (Tr. III) and did not request a bill of particulars enumerating the pertinent regulations before trial. Accordingly, as petitioner admitted at trial (Tr. III 26), he waived his right to object unless the indictment failed to state an offense. See Fed. R. Crim. P. 7 and 12(b)(2) and (f).

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."

Hamling v. *United States*, 418 U.S. 87, 117. See also *Russell* v. *United States*, 369 U.S. 749; *United States* v. *Debrow*, 346 U.S. 374. The indictment here (Pet. App. 32-34) charged that petitioner on November 12, 1972, "fraudulently or knowingly did import or bring merchandise, that is, various pieces of clothing, china, antiques, and decorative brass and copper ware, into the United States," and that petitioner "failed to manifest or declare" this merchandise in violation of 19 U.S.C. 1459 and "failed to declare all articles which he brought into the United States," in violation of 19 U.S.C. 1498(a)(6). Thus it plainly was sufficient under *Hamling*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1977.

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